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95-1092

NO. _____

Supreme Court, U.S.
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CLERK

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Janet L. Douglass, Petitioner,

v.

United States
Department of Transportation, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD, DALLAS REGION

Janet L. Douglass
Petitioner

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Pro Se Petitioner

67pp

QUESTION PRESENTED

Is the Whistleblower Protection Act of 1989 (WPA) clearly equitable in weight of law and remedy considering a whistleblower risk's life, family, career, loss of comfort and property in making a protected disclosure that upholds ethical principles, the U.S Constitution, and statutory law. Is it constitutional then, to deprive federal whistleblower a trial by jury conducted under well-seated rules of the court, for illegal acts committed in reprisal?

Under provisions of WPA and statutory laws bound unto a federal whistleblower seeking relief, can an "official" commit criminal acts in reprisal and enjoy absolute immunity?

Does the WPA unequivocally prevent and protect whistleblowers from reprisal with sound provisions of law providing equitable remedies to compensate federal whistleblowers for actual, compensatory and exemplary damages incurred from any illegality committed (civil, criminal or common law) manifested by reprisal? Consider Federal v. Non-federal whistleblower in this context?
Does the elaborate federal administrative scheme adequately provide for such statutory and constitutional challenges?

Does WPA seek to protect and identify a unique "group" of individuals as defined in CSRA Title VII, in claims of disparate treatment and invidious discrimination under a "Bivins" action?

LIST OF THE PARTIES

RESPONDENTS:

U. S. Department of Transportation, Secretary
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Washington, D.C. 20590
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U. S. Federal Aviation Administration, Administrator
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U.S. Federal Aviation Administration, Reg. Administrator etal, 2601 Meacham Boulevard
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III. NATIONAL INTEREST: Invidious discrimination, is a whistleblower's nightmare and has no bounds in the Government arena. Even the MSPB's blatant errors and convolutions appear to Petitioner a continuation of such treatment. The administrative scheme is so lax, no real federal rules of procedure to follow, the hearing is not fair and equitable to a federal whistleblower to have serious issues ruled on by one judge in the prejudicial atmosphere of the MSPB. Judicial review of MSPB interpretation is essential and is of national interest since "factors counselling hesitation" is a factor to be considered in federal claims. This case evidences the administrative scheme is not viable substitute in law and equity since infamous crimes have gone unpunished under this administrative scheme; therefore, the statutory laws of this country are easily circumvented under the present system. 10

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Janet L. Douglas, petitioner, respectfully prays for issue of a writ of certiorari to review the judgment of the United States Merit Systems Protection Board, Dallas Region involving Respondent, (hereinafter "Agency"); prays for interim relief authorized by Section 6 of the Whistleblower Protection Act of 1989; prays for equity in law and justice for all whistleblowers; prays for any other relief she proves herself justly entitled in this case.

OPINIONS BELOW

The Order of the U. S. Court of Appeals for the Federal Circuit, (App. Infra, A) reported as 95-3541. The Merit System Protection Board, Dallas Region (App. infra, A) is reported as DA-0752-95-265-I-1 and Merit System Protection Board, Dallas Region, (App. Infra, B) is reported as DA-0752-95-265-S-2. The Merit Systems Protection Board, Dallas Region (App. infra, B) is reported as DA-0752-94-0179-I-1 and DA-0752-94-0179-S-1 and DA-0432-93-0459-I-2 and DA-0432-93-0459-S-2.

JURISDICTION

The court of appeals entered its Order in reconsideration of it's August 11, 1995 dismissal on September 1, 1995 and is set forth in Appendix A. This Court's Jurisdiction is invoked under the WPA (P.L. 101-12, SEC.3, Subchapter III-Individual Right of Action in Certain Reprisal Cases, paragraph (h)(1) pgs.103 STAT.29-30) specifically provides for judicial

review. Jurisdiction is also invoked under Title 28, U.S.C. Section 1254(1). Therefore, Petitioner asserts she has standing before this Supreme Court.

STATUTORY PROVISIONS INVOLVED

P. L. 101-12, Whistleblower Protection Act of 1989. Privacy Act of 1974. Title VII Civil Service Reform Act of 1964 (CSRA). 42 U.S.C. Section 2000e et seq and 42 U.S.C. Section 1985/6. Title 5 Chapters 551 and 552. 18 U.S.C. Section 541

STATEMENT OF THE CASE

Petitioner made a protected disclosure January 26, 1988 concerning gross waste, fraud, abuse and mismanagement of Mr. Murphy, a Division Manager in the Federal Aviation Administration (FAA) Airway Facilities Division, Southwest Region (Appendix B, Pgs. 23 & 24). The Agency's FAA Administrator breached his promise of confidentiality, violating the Privacy Act of 1974 Pope v Bond 641 F.Supp 489 (DDC 1986) since her hotline control number (her identity number) was published and widely distributed throughout the Agency with special emphasis to Agency Southwest Region FAA managers and supervisors, as early as January 26, 1988, (See Appendix B, Pg.24). Consequently, after a hugh investigation with around 85% of the Airway Facilities Division supporting Petitioner's allegations, Mr. Murphy abruptly retired with 29 years of service, March of 1988. It took the Agency's Southwest

Region managers some time to "clean up" the paperwork, but Petitioner felt Agency retaliation almost immediately in her office atmosphere. After two years, the Agency intensified the retaliation and by July of 1992, the Agency began an intensive masquerade in retaliation beginning with a verbal reprimand, because she discovered the payment of night differential premium pay while requesting compensation time off in lieu of overtime worked (5 U.S.C. Chps. 551 & 552). The retaliation intensified until a written reprimand over false accusations, then a proposed removal for disruptive communications, a misrepresented performance improvement plan, a suspension for false accusations of criminal assault charges, then removal in May of 1993. (MSPB Appeal DA-0432-93-I-1 & 2 and DA-0432-93-S-1 and S-2 Appendix B). June of 1993 she formally filed her first discrimination complaint. The initial decision awarded Petitioner nothing. Her records were to be restored and if a Petition for Review was filed Petitioner was ordered to be placed on an interim relief status under Section 6 of the WPA until final decision in the case (See Appendix B Pg 1 and Pg 4). The Agency's Representative, Ms. Williams, wrote Petitioner a letter January 27, 1994 (see Appendix C Pg 4), confirming the AJ's order and defining the interim relief which was the status of Petitioner. Petitioner had enrolled in College to continue her 9 year personal education. She had scheduled her classes to fit her working schedule, she had been on a 10-hour day 4-day work week for almost 2 years with Thursday's as a regular day off.

Petitioner usually attended classes on her regular day off and forgo the other class day through the work week if it was not an evening class.

However, the Agency's deciding official wrote Petitioner a letter on February 14, 1994 (Valentines Day) and ordered her back to the duty station beginning February 16, 1994, which was not a Monday or the beginning of a new pay period. The onset of severe retaliation began when she appeared at her work station on February 16, 1994. Petitioner cites WPA Section 6. Since he (Agency's deciding official) removed her May 1993 for being disruptive, what were his grounds to require her in the work place? It was apparent the Agency's deciding official had no intention of giving her duty tasks as administrative technician to her, instead, there was nothing for her to do except sit in his view for 8 hours a day. The other employees would not talk to her and when they did, there was a problem with her actions, the atmosphere was so tense you could cut it with a knife. After a month of this kind of intense hostility, Petitioner got sick, she thought the flu. March 24, 1994, she was diagnosed with peptic ulcers, but the situation worsened, since the Agency's deciding official would not recognize her medical certificates in granting sick leave. The sexual harassment by the Agency managers was evident and discrimination complaints were filed by Petitioner, but the Agency did not respond to her complaints.

Petitioner learned that she was being investigated by the Agency by letters from her school. (Appendix C, Pgs 25 & 36). Petitioner requested the Agency several times for advance of sick leave to recuperate from her ulcer disease but the Agency would not respond. By May 16, 1994 the diagnoses was confirmed by a "endoscope" Petitioner had developed four new ulcers while on heavy medication to cure the ulcers; therefore, Dr. Berenzweig wrote a letter (Appendix C Pg. 38 & 72) in an attempt to get her sick leave approved.

Petitioner is a diabetic her physician, Dr. Forshay, who first diagnosed the ulcers on March 24, 1994, was calling her at work to verify that she was not away from the hostile environment, consequently he recommended Dr. Berenzweig get involved, a specialist.

May 20, 1994 Petitioner was not given advance of sick leave by the Agency even though they had learned that she had changed her school schedule to meet her mandatory duty hours, (Appendix C Pg 30, 7, & 8). Hence, the Agency attempted to squelch their problem with an open interview with her about their investigation activities. (Appendix C Pg 43 & 44). May 22, 1994, after Petitioner's submission of Dr. Berenzweig's May 16, 1994 letter, she still was not given the need sick leave by the Agency. May 23, 1994 Petitioner filed a lawsuit against the Agency in federal district court. (See Appendix C, Pg 40). The federal district judge ordered the sick leave be

granted (Appendix C, Pg 41).

However, the Agency's retaliation still continued through their security investigation. Bivins v Six Unknown FBI Agents, 403 U.S. 388 (1971) Egger v. Phillips, 710 F.2d 292 (1983) While Petitioner was recuperating on sick leave, she was ordered (by the Agency) to return to the work place for more harassing about her school. Federal district Judge Mahon ordered her to return for the interviews but said she did not have to speak. (Appendix C, Pgs 50,51 & 49). Petitioner returned for the interview and did answer their question. Petitioner in answer to their question stated they had violated her right to privacy set forth in the penumbra to the Constitution, the First, Third, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments. Petitioner cites Privacy Act of 1974, Griswold v Connecticut, 381 U.S 479 (1965) Roe v Wade,410 U.S. 113 (1973) and Katz v U.S 385 U.S. 347 It was obvious the Agency knew not what she meant. June 21, 1994 under duress, Petitioner was ordered to sign the Agency's document before leaving the interview and she cooperated. (Appendix C Pg 52). However, again Petitioner was ordered off of sick leave July 1, 1994, for another interview for the Agency to ask her the same question. Petitioner again attended the interview and gave the Agency the same answer. Further, in the July 1, 1994 interview, the Agency's deciding official gave Petitioner a Criminal Referral letter, that could have been mailed to her, see Appendix C Pg 54. Hence, the investigator again harassed her by stating the

same question as was asked in the June 21, 1994 interview; petitioner answered in the same manner and was excused.

July 6, 1994 the Agency's deciding official proposed his second removal of this whistleblower (Appendix C Pg.55). July 27, 1994 the Agency's deciding official decided to remove her on August 11, 1994; hence Petitioner was formally removed from government employ. August 13, 1995, the Agency's FAA Payroll confiscated Petitioner's money from her checking account and savings account. (Appendix C Pg 76, 77,78, 88, 90, 91).

September 9, 1994, 120 days had elapsed from her first notifying the Office of Special Counsel of the threatened retaliation, (Appendix C, Pg. 37); therefore, Petitioner filed her first Individual Right of Action Appeal and Request for Stay. (Appendix B Pg 4). She was denied jurisdiction. (Appendix B Pg 10) Petitioner petitioned for review that decision and refiled November 29, 1994. (Appendix A.1, Pgs 200-219). The Stay Request was denied for jurisdiction. Douglass v Department of Transp. (1993 MSPB) 60 (see Appendix A.1, Pgs.192-195). The retaliation was felt all through the appeal by the MSPB rulings. In the Prehearing on 2-13-95 the AJ and the Agency did their best to squelch the issue of the illegal payment of funds by interrupting me every time the subject was brought up, then on the record the AJ intentionally misstated the issue. (Appendix A.1 Pg.139, at line 20-26, & Pgs 146, line 7-25, Pg 148

line 4 to Pg 155 line 26). Disparate treatment became an issue in the prehearing conference on 2-13-95, since the AJ ordered the documents be given Petitioner before February 15, 1995 about Ms. Pyatt (Appendix A.1, Pg 172, line 7 through Pg 175 line 5.). However, the documents were not supplied to the Petitioner, instead the Agency entered a Protective Order, (Appendix A.1 Pgs 103-105). At the hearing, 2-23-94, a prehearing conference was had and the AJ recognized and confirmed the disparate treatment in exchange for the Agency not producing the documents to Petitioner. (Appendix A.1 Pgs. 41-46, line numbers 236-349). Appendix C was lodged as an information booklet, it highlights the events in chronological order, and I believe worth reading to better understand this case.

REASONS FOR GRANTING THE WRIT

IMPORTANCE: The WPA (P.L. 101-12, SEC.3, Subchapter III-Individual Right of Action in Certain Reprisal Cases, paragraph (h)(1) pgs.103 STAT.29-30) specifically provides for judicial review wherein it states: "An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision. (App., infra, C). Congress deemed this act important; and provided for judicial review of the Board's final decisions. A whistleblower is the backbone of America, who has integrity and courage to stand for law and justice. Congress recognized a

whistleblower's global interest in the greatest good for the greatest number and sought to protect such individuals. It is important for this Court to review this case since it is apparent that the WPA is so weak in law and definition that the Agency and MSPB have misinterpreted and ignored the WPA. Not to mention that the MSPB Initial Decision of March 30, 1995 is evaluated based on an improper level of proof, being a preponderance of the evidence when by Amendment of October 29, 1994, the burden of proof was amended to be only circumstantial evidence. Gergick v Austin, 997 F.2d 1237 (8th Cir. 1983); Gergick v. General Services Administration, 43 M.S.P.R. 651, 662-663 (App. A, Pg 22, Footnote 3 & 4); 5 U.S.C. Section 1221, as amended October 19, 1994.

CONFLICT: Petitioner, a whistleblower, has been removed from government employee twice, May 1993 and August 1994, she alleged reprisal for whistleblowing in three IRA actions before MSPB. The MSPB decisions appear conflicting over the interpretation, definition of whistleblower retaliation, in awarding a stay of the removal action; finding jurisdiction for the IRA; and specificity in finding the element of a "Contributing Factor" whistleblow reprisal influences the removal action. Invidious discrimination, is a whistleblower's nightmare and has no bounds in the Government arena. Even the MSPB's blatant errors and convolutions appear to Petitioner a continuation of such treatment. The administrative hearing is so lax, no real federal rules

of procedure to follow, is that fair and equitable to a federal whistleblower to have serious issues ruled on by one judge in the prejudicial atmosphere of the MSPB? Judicial review of MSPB interpretation is essential and is of national interest since "factors counselling hesitation" is a factor to be considered in federal claims. Bush v Lucas, 462 U.S. 367 (1983)

NATIONAL INTEREST: Congress deemed this Act important, hence provided for judicial review of the Board's final decisions. Congress sought to protect whistleblower's who truly serve the american public. Congress recognizes whistleblowers have the courage and strength to make a "stand" for law and justice against tremendous odds, promoting the greatest good for the greatest number and Congress sought to protect such individuals. Government official detest whistleblowers since they expose their corruption. It is of national interest since this elite Government Agency and MSPB have misinterpreted and completely ignored the WPA and other statutory laws. There are no bounds in the administrative scheme for controlling violations of constitutional claims.

The decision of the U. S. Court Of Appeals and U.S. Merit Systems Board are erroneous. Disparate treatment is an issue in this case; therefore, the U.S. Court of Appeals erred in dismissal. The MSPB erred in it's Initial Decision since it used the wrong level of burden of proof (preponderance of evidence instead of

circumstantial evidence) in deciding the element of retaliation under WPA.

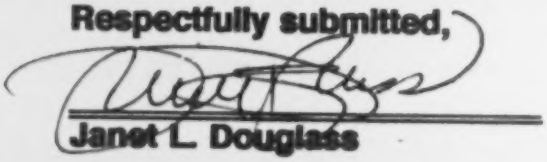
The question presented is important whistleblowers are sought to be protected by Congress. Our government's deficit is impacted by the strength of whistleblowers. Indeed, government is for the people; by the people and of the people; federal and corporate workers best know the waste and abuse in the government; therefore, given the strength and protection of law and remedy with adequate damages for reprisal, more whistleblowers will speak out against wrongdoing and gross waste, fraud and abuse which will effectuate the mission of the President and Congress to reduce government spending which impacts the deficit.

CONCLUSION

The questions presented are important and this Court's review of this case will make a difference in the federal work place, as well as strength the our nation. The strength of a chain is only as strong as one link. If retaliation of this magnitude is allowed, there will not be another protected disclosure in the (Agency) FAA and corruption will prevail. The kind of corruption endured under the "Murphy" regime that trickle-down into our families. Therefore, Petitioner asserts that the writ of certiorari should issue and requests under Section 6 of the WPA she be granted interim relief until final decision in all suits pending against the Agency, respondents.

SIGNED the 30th of November 1995. Resigned and resubmitted this 22nd day of December 1995.

Respectfully submitted,



Janet L. Douglass

CERTIFICATE OF SERVICE

I, Janet Douglass, Petitioner, by signature above, hereby certify that on this 22nd day of December 1995, one copy of this Petition for a Writ of Certiorari in the above-styled entitled case was mailed, first class postage prepaid to:

Solicitor General of the United States
Room 5614, Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, DC 20530

APPENDIX A

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3. Initial Decision, MSPB, 3-30-95 DA-0752-95-0265-I-1 (Pgs 5-37)

LODGED ARE: APPENDIX A.1 AND B - VOLUME 1
APPENDIX C - VOLUME 2

NOTE: Pursuant to Fed.Cir.R.47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-3541

JANET L. DOUGLASS,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

ON MOTION

Before LOURIE, Circuit Judge.

ORDER

Janet L. Douglass moves for reconsideration of the court's August 11, 1995 order dismissing her case for failure to file a Fed.Cir.R.15(c) statement. The Department of Transportation has not responded.

On July 14, 1995, we informed Douglass that her petition would be dismissed if she failed to file a Fed.Cir.R.15(c) statement within 14 days. Douglass did not file a completed Fed.Cir.R.15(c) statement. She argues once more that because her case involves discrimination,* the case should be

*Douglass continues to insist that her claim of disparate treatment is a discrimination claim.

transferred to the district court. Even though we specifically stated that Douglass' case did not involve discrimination and that the case was properly before this court, Douglass failed to comply with the court's rules concerning the filing of a R.15(c) statement. Thus, there are no grounds for reconsideration.

Accordingly,

IT IS ORDERED THAT:

The motion for reconsideration is denied.

SEP - 1 1995
Date

Alan D. Lourie
Circuit Judge

cc: Janet L. Douglass
Timothy B. Walthall, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

SEP - 1 1995

FRANCIS X. GINDHART
CLERK

s10

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-3541

JANET L. DOUGLASS,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

O R D E R

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

The petitioner having failed to file the required Statement Concerning Discrimination, it is

ORDERED that the petition for review be, and the same hereby is, DISMISSED, for failure to prosecute in accordance with the rules.

FOR THE COURT,

August 11, 1995 Francis X. Gindhart pt

Francis X. Gindhart
Clerk

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

AUG 11 1995

FRANCIS X. GINDHART
CLERK

cc: Clerk's Office, MSPB
JANET L. DOUGLASS
TIMOTHY B. WALTHALL

ISSUED AS A MANDATE: August 11, 1995

DOUGLASS V TRANSPORTATION, 95-3541
(MSPB - DA0752950265I-1)

****

Note: Pursuant to Fed.Cir. R. 47.6, this order is
***not citable as precedent. It is a public record. ***

****

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

Janet L. Douglass, Appellant,	)	
v.	)	DOCKET NUMBER DA-0752-95-0265-I-1
Department of Transportation, Agency.	)	DATE: MAR 30,1995

Janet L. Douglass, Colleyville, Texas, pro se.

Eric E. Anderson, Esquire, Fort Worth, Texas, for the agency.

BEFORE

U. Sidney Cornelius, Jr.
Administrative Judge

INITIAL DECISION

Janet L. Douglass filed an appeal on November 30, 1994, from an action taken by the Department of Transportation which removed her from the position of Administrative Technician, effective August 11, 1994. The Board has jurisdiction over this appeal pursuant to the provisions of 5 U.S.C. Section 75-11-75-13.

Based on the following analysis and findings, the agency's action is AFFIRMED.[1]

ANALYSIS AND FINDINGS

According to the notice of proposed removal dated July 6, 1994, the appellant was removed for (1) creating a disturbance on the job; (2) intentional misstatement or concealment of a material fact in connection with her employment; and (3) refusal to provide information in connection with an official investigation. The agency's action may be sustained if it is supported by a preponderance of the evidence.[2]

In support of charge one, the notice related the following: On May 6, 1994, the appellant confronted a fellow employee, Pat Blackman at the receptionist work area. Appeal File, Vol. 2, table 4D. The appellant went to the receptionist work area, raised her voice until it carried through the office, and attempted to provoke Blackman into an argument by angrily quizzing her about her whereabouts during the time she had been on leave. The appellant's

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[1] At the appellant's request, a hearing was held in this matter.

[2] A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. Section 1201.56(c)(2) (1994).

questioning was so loud and vociferous that it attracted the attention of other workers in the office.

The notice further related that the acting officer manager, Rick Andrews, attempted to quell the disturbance and restore order. Acting highly agitated, the appellant directed her anger at Andrews, confronting him in a very aggressive tone and manner, angrily demanding that Andrews show her Blackman's leave slip and explain her whereabouts to her. Andrews attempted to calm the appellant, however, she continued to be disruptive and combative. Andrews directed the appellant to go to her work area twice. The appellant refused to leave and lectured Andrews on court cases.

The notice explained that the appellant's disruptive behavior stopped work in the office for at least 15 minutes. Her behavior interfered with the work activity of her fellow employees and it adversely affected the efficiency of the service.

In support of charge two, the notice cited seven specifications. Under specification one, the notice related that in January 1994, the appellant enrolled in two college courses, French 1614 and French 2623, at the Tarrant County Junior College (TCJC). Both courses were scheduled to meet on Tuesdays and Thursdays during the agency's normal business hours of 8:00 a.m. to 4:30 p.m. French 2623 met from 9:30 a.m. to 10:50 a.m. on Tuesdays and Thursdays. French 1624 met from 11:00 a.m. to 12:20 p.m. on Tuesdays and Thursdays. The notice explained that the appellant deliberately concealed the fact that she had enrolled in college classes that

were scheduled to meet during her assigned duty hours on two normal business workdays each week.

Under specifications two through seven, the agency explained that the appellant was absent from duty on seven different days during March and April 1994 while she attended two regularly scheduled college classes at TCJC during her assigned duty hours. After each absence, she requested the agency to grant her sick leave for the time that she was absent by submitting requests for sick leave, thereby, intentionally misleading her supervisor to believe that she was too sick to work.

In support of charge three, the agency related the following: On May 19, 1994, the appellant was instructed to appear on May 23, 1994, for an interview in connection with an official investigation. The appellant did not appear. On May 25, 1994, the appellant was offered the opportunity to appear on May 26, 1994, to provide information in connection with the official investigation. The appellant did not appear. On June 8, 1994, the appellant was instructed to appear on June 14, 1994, for an interview to answer questions in connection with the official investigation. The appellant was advised that failure to appear could result in disciplinary action as serious as removal.

The notice further related on June 13, 1994, the appellant filed a motion in the United States District Court seeking to enjoin the interview. As a result,

the interview was delayed. The appellant's motion was denied on June 16, 1994. On June 15, 1994, the appellant was instructed to appear on June 21, 1994, for an interview to answer questions in connection with the official investigation. The appellant was advised that failure to appear could result in disciplinary action as serious as removal. The appellant appeared and was interviewed by Special Agent Peter Dodd in connection with the official investigation of the appellant's enrollment and attendance in two college courses at TCJC. At the interview, Agent Dodd read the appellant the pertinent information from the Privacy Act Notice for Employees/Contractors, which states in part,

> As an employee of the FAA, you are required to provide information pertinent to the matter(s) under investigation. Failure to provide such information may subject you to disciplinary action, including removal from the FAA.

The appellant acknowledged reading and understanding the notice. Dodd then informed the appellant of the nature of the investigation, the preliminary findings of the investigation, and asked her whether or not she had attended school while on sick leave. The appellant claimed that the interview was a violation of her rights and refused to answer any questions.

The notice related that the appellant's refusal was called to her agency manager's attention. The manager then told the appellant that she must

cooperate or that she might be removed from her job. He read paragraphs 209(a)(1) and 209(a)(2) of the FAA Code of Conduct and Discipline Order 3750.4A to the appellant. The appellant said that she understood; yet, she still refused to answer any questions. The manager again explained that the appellant was required to cooperate and that her refusal to provide information pertinent to the matter under investigation could result in her removal. The appellant steadfastly refused to answer any questions or to provide any information concerning the official investigation. The appellant claimed she was relying on instructions from a judge and that she was asserting her Fifth Amendment privilege against compulsory self-incrimination to protect herself against any disclosure that could be used in her criminal prosecution or could lead to other evidence that might be so used.

The appellant created a disturbance on the job.

Richard A. Andrews, Aviation Safety Inspector, testified that on May 6, 1994, the appellant came to him with the agency's "sign-out board" and asked where Patricia Blackman had been the previous day. Andrews related that he told the appellant that there was no requirement for Blackman to inform the agency of where she had been when she was on leave. Andrews testified that the appellant became angry with him and continued to question him about Blackman's whereabouts. He said that he eventually told the appellant that it was none of her business

where Blackman had been and to go back to work.

Andrews said that the appellant left; however, a few minutes later he heard a disturbance at the switchboard. He said that he listened for a while and subsequently went to the switchboard area. There he said he found the appellant with Blackman and agency employee Linda Eustace and that everyone was upset. He explained that the appellant was seeking to find out where Blackman had been when she was on leave. He stated that he told the appellant to go back to work two or three times. He related that the appellant contended that she had gotten into trouble in the past for not knowing where Blackman was when she was away from the office.

Andrews explained that the incident lasted from 10 to 15 minutes. He said that the atmosphere in the office was "pretty tense" afterward. Andrews described the appellant's demeanor as hostile and aggressive. He confirmed that the statement found at tab 4f(3) of the agency's response is the statement he prepared after the incident. See Appeal File, Vol. II, tab 9, subtab 4F(3).

Patricia Blackman testified that she is employed by the agency as an Aviation Safety Assistant. She related that in her position she provides administrative and clerical support for her office. She stated that on May 6, 1994, she was filling in for the office receptionist, Mary J. McCoy. Blackman related in regard to the May 6 incident that she and

Eustace were talking at the receptionist desk when the appellant approached her yelling in a loud voice about her whereabouts on May 5, 1994. Blackman said that she told the appellant that she had been on annual leave and that it was not her business where she had been. She also said that she told the appellant that, if she had any questions regarding her absence, she should speak to her supervisor. Blackman stated that the appellant responded that it was her business where Blackman had been and that she continued to stand at Blackman's workstation writing in her notebook. Blackman said that she and Eustace tried to ignore the appellant but she continued to stand at her workstation talking in a loud voice. She confirmed that eventually Andrews entered the area and inquired what was going on.

Blackman said that the incident lasted about 15 minutes. Blackman asserted that she did not yell at the appellant despite the fact that the appellant had been yelling "right in" her face. She stated that the appellant's conduct created a hostile atmosphere.

William E. Racovich, Aviation Safety Inspector, testified that he recalled hearing Andrews and the appellant speak about Blackman's whereabouts on May 6, 1994. He explained that the conversation was loud and that he thought to himself, "there she goes again agitating the entire office." Racovich confirmed that he prepared the statement found in the file describing the incident. Appeal File, Vol. II,

tab 9, subtab 4F(4).

The record also contains a statement bearing the signature of Linda Eustace. See Appeal File, Vol. II, tab 9, subtab 4F(2). Eustace confirmed Blackman's version of the events of May 6 and she specifically related that the appellant's confrontation with Blackman "was loud enough to attract the attention of other employees and caused a disruption in the office."

The appellant denied that she had created a disturbance May 6, 1994. She asserted that it was her business to know where Blackman had been on May 5, 1994, because she had answered the telephone that day and she needed to be able to explain where Blackman was in someone called looking for her. She claimed that she had gotten into trouble in the past because she had not known where Blackman was when Blackman was away from the office. The appellant noted that Blackman had improperly filed out the signout sheet.

A determination of the truthfulness of the agency's charge turns on the credibility of the witnesses. See Hillen v. Department of the Army, 35 M.S.P.R. 558 (1987). I find the testimony of Andrews, Racovich, and Blackman to be more credible than the appellant's.

Andrews testified in a direct and straightforward manner and he was sure of his facts. Moreover, his

testimony was consistent on direct and cross-examination. Further, his testimony was consistent with the statement that he prepared describing the incident of May 6. Also, Racovich corroborated Andrews' testimony that he had earlier told the appellant that it was not necessary to question Blackman further regarding her whereabouts on May 5. I found Racovich's testimony to be credible. Racovich testified in a direct and straightforward manner and his testimony was corroborated by his statement describing his recollection of the conversation between Andrews and appellant.

Blackman also testified in a direct and straightforward manner. She was sure of her facts and her testimony was consistent on direct and cross-examination. She testified that she had prepared a statement describing the incident and her testimony was consistent with the statement bearing her signature. See Appeal File, Vol. II, tab 9, subtab 4F(1). Also, Eustace's written description of the incident of May 6 was consistent with Blackman's testimony.

Several points detract from the appellant's claim that she did not create a disturbance on May 6. Although the appellant offered evidence and argument regarding her need and right to know Blackman's whereabouts on May 5, 1994, she provided little support for her contention that she had not created a disturbance on May 6 as alleged by the agency. The appellant noted that Blackman

had told her that it was none of her business where she was on May 5; however, neither the appellant nor anyone else testified that Blackman raised her voice at the appellant when Blackman made that statement. Also, the appellant did not dispute Andrews' claim that he had already told her that it was none of her business where Blackman was on May 5 because Blackman was on annual leave. Moreover, although the appellant claimed that she needed to know Blackman's whereabouts on May 5 because she was answering the telephone, she did not explain why she needed to know that information on May 6 when Blackman had returned to the office and was in fact answering the telephone herself. Accordingly, I find that preponderant evidence supports the agency's charge that the appellant created a disturbance on the job on May 6, 1994. Therefore, the charge is sustained.

<u>The appellant intentionally misstated or concealed a material fact in connection with her employment.</u>

William Ernst, Supervisory Aviation Inspector, testified that the appellant had not reported for work on the dates cited in the notice of proposed removal and that she had also requested sick leave for her absences on those dates. He cited the Application for Sick Leave, Standard Form 71, found in the record as an example of the sick leave requests submitted by the appellant. Ernst explained that the appellant had initially submitted documentation with her requests for sick leave which the agency found

unacceptable. He said that she subsequently submitted additional documentation which was acceptable and that her sick leave requests had been granted on the basis of the agency's belief that she was too ill to come to work. He explained, however, that the agency later learned that the appellant had in fact attended school on the dates she had claimed to be too ill to come to work and perform the duties of her position. Ernst testified that the appellant never informed him that she was attending school on the dates that she requested sick leave.

The appellant did not dispute the fact that she was absent on the dates cited in the notice; that she requested sick leave for those dates; and that she attended college classes on those dates. She asserted, however, that her physician had diagnosed her as having an ulcer and that she needed to be away from the stressful environment that caused her ulcer. Moreover, she claimed that she never specifically stated that she was too ill to come to work when she requested sick leave. In support of her contention regarding her medical condition the appellant provided a copy of a medical report signed by Harold Berenzwieg, M.D. Appellant's Exhibit 21.

The appellant also explained that in 1988 she had gone to visit agency counselor, Frances Leach, because of the problems she was having at work. She staid that Leach had advised her to get away from the problem that was causing her stress. The

appellant reasoned that work was the source of her ulcer and that, therefore, she believed that it was appropriate for her to be away from work doing something that she enjoyed such as going to school.

The appellant related that in the past she had had an alternate work schedule which gave her Thursdays off. She indicted that she had tried to get the agency to give her the alternate work schedule again. She acknowledged, however, that she did not have Thursdays off at the times cited in the proposal notice when she was attending school. The appellant noted that it is the agency's policy to encourage employees to continue their educations and that financial assistance is sometimes offered.

Frances Leach confirmed that she had met with the appellant in 1988. She also confirmed that she had recommended that the appellant get away from the problem that was causing her stress if she could not resolve the problem.

I do not find the appellant's arguments persuasive. The fact that the appellant requested sick leave indicated that she was claiming to be too ill to come to work, whether or not she actually ,made such a statement on her sick leave form. Although her physician related in May 1994 that the appellant was suffering from "benign ulcer disease," with "no overriding risk factors at the present time other than stress at work," there is no evidence that he or the appellant advised the agency that the appellant was

to stay away from work and to attend school on the dates cited. See Appellant's Exhibit 21. Moreover, the fact that Leach told the appellant that she should get away from the source of her stress did not mean that, without agency knowledge and concurrence, she was free to take sick leave and go to school. Further, the fact that the appellant had had Thursdays off in the past had no bearing on her being able to take Thursdays off in March and April 1994, if her current work schedule did not permit that day off. Finally, the fact that the agency encourages its employees to attend school did not give the appellant the right to attend school without the agency's knowledge and approval during normal business hours.

There is no dispute that the appellant requested sick leave for her absences on those days that she attended classes during her duty hours. I find that the appellant's request for sick leave for her absences was an intentional attempt to mislead the agency into believing that she was too ill to come to work. Moreover, there is no dispute that the appellant never informed her supervisor or any other agency official that she was enrolled in and attending two college courses which were scheduled during her duty hours. I find that the appellant's enrollment and attendance in two college courses, which were scheduled during her duty hours was a material fact connected with her employment which the appellant concealed from the agency. I also find that the appellant's concealment of that fact was

intentional.

I find, therefore, that preponderant evidence supports that agency's contention that the appellant intentionally made misstatements to the agency and concealed a material fact in connection with her employment. According, the charge is sustained.

The appellant refused to provide information in connection with an official investigation.

Ernst testified that, as related in the notice of proposed removal, on March 19, 1994, he instructed the appellant to appear on May 23, 1994, for an interview in connection with the agency's official investigation of her attendance in school while on sick leave. He explained that the appellant did not appear on that date. He further related that, after two subsequent attempts to have the appellant appear for the interview, she appeared on June 21, 1994.

Ernst noted that although the appellant appeared for the interview on June 21, 1994, she would not answer any questions. He related that, after introducing the appellant to Special Agent Dodd, he left the room. He said that Dodd attempted to interview the appellant and that she refused to answer any questions because she claimed that the interview was in violation of her rights. Ernst stated that, when Dodd told him what had happened during the interview, he returned to the room and, citing

agency regulations, told the appellant that she was required to cooperate with the investigation. Ernst said that he told the appellant that her failure to cooperate in the investigation could lead to her removal. He related that the appellant said that she understood what he had said; yet, she still refused to answer Dodd's questions. He said that the appellant insisted that she did not have to make any disclosure that could be used in a criminal prosecution.

Ernst explained that, because the appellant had raised her right against self incrimination, the agency went to the United States Attorney for confirmation that he would not prosecute the appellant. He stated that the United States Attorney provided a letter dated July 1, 1994, stating that his office had declined criminal prosecution in the appellant's case. See Appeal File, Vol. II, tab 9, subtab 4E(1), subsection B(1). Ernst related that another interview was scheduled with the appellant for July 1, 1994, at which time the appellant was shown the letter from the United States Attorney by Dodd. He stated that the appellant still refused to answer any questions. He said that Dodd called him in and he tried unsuccessfully to get the appellant to answer Dodd's questions.

Dodd corroborated Ernst's testimony about the appellant's refusal t answer any questions regarding her attendance at TCJC. He related that the appellant was shown the letter from the United

States Attorney; yet, she still refused to cooperate in the investigation, asserting that she did not have to participate for constitutional reasons.

The appellant did not deny that she had refused to answer any questions regarding her school attendance during the interviews. Moreover, she did not deny that the reason she gave for her refusal to answer the questions was that they violated her constitutional rights. She also claimed that a Federal judge had told her that she did not have to answer the questions.

There is no dispute that the appellant refused to answer any questions regarding her attendance at school during duty hours. Although she claimed that a Federal judge had instructed her not to answer any questions, she provided no evidence to support that claim. The record reflects that the agency assured the appellant both orally and in writing that her cooperation in the investigation would not lead to criminal action being taken against her. Moreover, Ernst warned the appellant that her refusal to cooperate could lead to the agency's taking disciplinary action against her.

An agency may discipline an employee for refusing to answer questions about the employee's conduct when the agency assures the employee that any answers given will not be used in criminal prosecution and it warns the employee that refusal to answer could lead to discipline. See Pope v

Department of the Navy 63 M.S.P.R. 51 (1994). I find that preponderant evidence supports the agency's charge that the appellant refused to provide information in connection with an official investigation concerning her employment. Therefore, the charge is sustained.

The appellant has failed to prove that her removal was in reprisal for her protected whistleblowing activities.

Whistleblowing is defined in pertinent part as "any disclosure of information by an employee...that the individual reasonably believes evidences a violation of any law, rule or regulation, or gross mismanagement of funds, an abuse of authority, or a substantial and specific danger to public health or safety." See 5 U.S.C. Section 2302(b)(8). If an appellant shows that a disclosure described under 5 U.S.C. Section 2302(b)(8) was a contributing factor[3] in the personnel action taken,[4] the action may not be

[3] A contributing factor means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure. 5 C.F.R. Section 1209/4(c) (1994).

[4] The appellant must meet her burden of proof by a preponderance of the evidence. See 5 C.F.R. Section 1201.56(a)(2) (1994).

sustained unless the agency demonstrates by clear

and convincing evidence[5] that it would have taken the same action in the absence of the disclosure. See 5 U.S.C. Section 1221. See Gergick v. General Services Administration, 43 M.S.P.R. 651, 662-63 (1990); 5 U.S.C. Section 1221(e); 5 C.F.R. Section 1209.7 (1994).

The appellant identified the following protected disclosures that she alleged led to the agency's removal action; (1) in 1988, she disclosed through the agency's hotline that an agency division manager had built his residence on favors from employees in return for those employees getting better jobs; (2) on December 4, 1992, she reported to the Federal Aviation Administration (FAA) Administrator that agency employees were being paid illegally as a result of their being paid a "night differential" in addition to receiving "compensatory time"; and (3) in March 1994 she disclosed that the deciding official in her action had improperly changed the agency's standard locking system.

In reference to disclosure number one, the appellant submitted a copy of a document that she testified acknowledged receipt of her hotline complaint made in 1988 regarding the improper conduct of an agency division manager. Appellant's Exhibit A(8). Along with the acknowledgment was a copy of a memorandum dated February 16, 1988, which indicated that the hotline complaint was being investigated. The appellant testified that the control number referenced in the memorandum was the

number that she had been assigned after filing the hotline complaint. The appellant stated that Ernst was aware that she had made a protected disclosure in 1988 because, in a previous Board hearing, her identity and the disclosure had been made known.

Ernst acknowledged that he had been made aware of the appellant's whistleblowing disclosure in 1988. He related, however, that he had had no involvement with the division manager cited in the appellant's complaint and that he could recall meeting him only once. Ernst asserted that the disclosure had nothing to do with the appellant's removal in 1994. Ernst noted that he had hired the appellant in 1990 for the Administrative Technician position and that he had recommended her for a promotion in 1992 which she received.

I find that the appellant's allegations of misconduct on the part of the division manager were protected.[6]

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[6] It is noted that Ronald H. Peay, the investigator who conducted the investigation involving the alleged misconduct of the division manager testified that the appellant was not the whistleblower in the 1988 investigation. Ernst, however, indicated that he did not dispute the appellant's claim that she was the whistleblower whose disclosure led to an investigation in 1988 of the division manager, for the cited misconduct.

I also find, however, that there has been no showing of a relationship between the appellant's whistleblowing activities and the agency's decision. The division manager identified in the 1988 was a "Mr. Murphy." The appellant did not show that Ernst was in any way involved in Murphy's misconduct. Moreover, she did not explain why Ernst would want to retaliate against her as a result of an investigation of Murphy in 1988. Also, she did not explain why Ernst would have hired her in 1990 and recommended her for a promotion in 1992 if he wanted to retaliate against her for a 1988 disclosure. I find, therefore, that the appellant has failed to show that her disclosure in 1988 of alleged wrongdoing by an agency division manager was a contributing factor in the agency's decision to remove her.

In reference to disclosure number two, the appellant related that she learned that employees were being improperly paid a night differential as well as compensatory time. She testified that as a result, on December 4, 1992, she reported to the FAA Administrator that agency employees were being paid illegally.

Ernst denied any knowledge of the appellant's filing of a report in December 1992 with the FAA Administrator regarding illegal payments. He related that he had become aware of the problem regarding the payment of the night differential and compensatory time as a result of a confrontation the appellant had with other employees regarding the

problem. Ernst acknowledged that the appellant was disciplined, not for bringing the matter to the agency's attention, but for the disturbance that she created when she discussed the problem with other agency employees. He also acknowledged that, as a result of the appellant's bringing the matter to the agency's attention, the practice was changed. Ernst testified that he had heard nothing from the Faa Administrator regarding the procedure nor had he or any other employee been negatively impacted as a result of the appellant's bringing the matter to his attention.

I find that the appellant's disclosure of the improper payment by the agency of a night differential and compensatory time was protected. Although Ernst indicated that he was unaware that the appellant had filed a report in December 1992 with the FAA Administrator regarding the practice, he acknowledged that the appellant brought the improper practice to his and other employees' attention and that the practice was subsequently stopped.

I find also, however, that the appellant has failed to show how her disclosure in 1992 was a contributing factor in the agency's action in 1994. Ernst's unrebutted testimony was that the procedure was changed from within, without any involvement from the FAA Administrator or any other agency official. Also, he indicated that the disclosure had no negative impact on him. Further, the appellant failed

to explain why, after such a long period of time, Ernst would have reason to retaliate against her a result of the disclosure. I find, therefore, that the appellant has failed to show that her disclosure regarding the improper payment of a night differential and compensatory time was a contributing factor in the agency's decision to remove her.

In reference to disclosure three, the appellant testified that she had gone to Randolph Simpson, Proficiency Support Specialist, regarding a discrimination complaint and that she had also questioned him about a key that she had been given for her office. she related that Simpson told her that only "best Lock" keys were to be used and that the key she had been given was not a "Best Lock" key. She related that in March 1994 she reported to the Office of the Inspector General that Ernst had improperly changed the agency's locking system.

Simpson testified that he recalled the meeting with the appellant. He corroborated her assertion that only the "Best Lock" locking system had been approved for use by the agency in its offices.

Ernst testified that he was unaware that the appellant had made a protected disclosure to the Inspector General regarding the changing of keys and locks in the office. He stated that it was not his decision what locks would be used. Ernst explained that he went to the persons at the agency who had

originally installed the locks in the office when he determined that they needed to be changed and that they called "Mr. Lock" to make the changes. Moreover, Ernst stated that he has never been told that the locks were improper or received any negative response from his superiors as a result of the change.

Although Simpson corroborated the appellant's contention that the agency-approved locking system was not used when the locks were replace, I do not find that the appellant has shown that such action was gross mismanagement. In any event, Ernst's unrebutted testimony was that he was not the person who decided which locking system would be used and that he was unaware of the appellant's disclosure. Moreover, there is no evidence that Ernst was in any way adversely affected by the appellant's disclosure. Accordingly, I find that the appellant has failed to show that her disclosure regarding the improper changing of the locks at the agency was a contributing factor in the agency's action.

<u>The appellant failed to show how the agency violated her First and Fourth Amendment rights.</u>

The appellant alleged generally that the agency's action violated her First Amendment right of free speech. She did not specifically explain the basis for her allegation. A review of the charges does not support such a contention. The appellant was

disciplined for creating a disturbance on the job, not for any protected speech. Also, the appellant made no showing of how a misstatement or concealment of a material fact had nay connection with protected speech. Further, she failed to show how her refusal to provide information in connection with an official investigation was protected by her right of free speech. Moreover, the appellant did not identify any statements that she made which were of public concern and for which she had been disciplined. The statements of a public employee are not protected under the First Amendment if they do not relate to a matter of public concern. See Means v Department of Labor, 60 M.S.P.R. 108 (1993).

In regard to her claim of a violation of her Fourth Amendment rights, the appellant asserted that the agency had no right to obtain her records from TCJC without her permission and that those records were, therefore, illegally obtained. Moreover, she asserted that the agency had no right to use the illegally obtained documents to support its claim that she had been untruthful regarding her sick leave requests.

Contrary to the appellant's assertions, the Board has held that the Fourth Amendment's exclusionary rule does not apply to Board proceedings. See Culley v. Defense Logistics Agency, 60 M.S.P.R. 204 (1993). Accordingly, based upon my review of the record, I find that the appellant has failed to show that the agency violated her First and Fourth

Amendment rights.

The appellant has not shown that the agency violated the Privacy Act.

Although the appellant asserted in her prehearing submissions that the agency had violated the Privacy Act, in her written closing argument, she claimed:

> Original jurisdiction for Privacy Act of 1974 violations are proper only before federal district court.

She did not indicate whether she, therefore, does not believe that the Board has jurisdiction over her claim of a violation of the Privacy Act by the agency. Moreover, she did not explain specifically how the agency violated the Privacy Act. As noted by the agency in its closing argument, although the appellant indicated that she believed that the release of her records by TCJC violated her privacy rights regarding those records, it was TCJC that released the records, not the agency. The appellant cited no other records that were improperly released by the agency. Accordingly, I find that the appellant has failed to show that the agency violated the Privacy Act.

The penalty selected by the agency is reasonable and promotes the efficiency of the service.

An adverse action may only be taken for such cause as will promote the efficiency of the service. 5 U.S.C. Section 7513(a). The Board has held that offenses such as those sustained in this appeal warrant disciplinary action. See Murray v Department of the Army, 40 M.S.P.R. 250 (1989); Walcott v. United States Postal Service, 52 M.S.P.R. 277, aff'd 980 F.2d 744 (1992) (Table); Pope at 52. Nevertheless, before it can be concluded that a particular penalty promotes the efficiency of the service, it must appear that the penalty takes reasonable account of all relevant mitigating factors in the particular case. See Douglas v. Veterans Administration, 5 M.S.P.R. 280, 303 (1981). In making such determinations, the Board will give due weight to the agency's primary discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's judgment, but to assure that it has been properly exercised. See Id. 306.

Ernst, the deciding official, testified that the agency considered the appellant's misconduct serious. He stated that the penalty selected was consistent with the agency's table of penalties. He also related that he found no other employees who had engaged in the same or similar misconduct as the appellant with the same extensive prior disciplinary record as the appellant. He confirmed that, as stated in the notice of proposed removal, the appellant's prior disciplinary record consisted of: (1) an oral

reprimand on August 4, 1992, for disruptive and confrontational on-the-job misconduct toward a fellow employee; (2) a written reprimand on September 24, 1992, for creating a disturbance by her disruptive on-the-job misconduct; (3) a one-day suspension on March 29, 1993, for creating a disturbance; (4) an oral admonishment on April 6, 1994, for failure to carry out a direct order; (5) an oral admonishment on April 20, 1994, for conducting personal affairs while on duty status and misuse of government property; (6) and a seven-day suspension on March 9, 1994, for creating a disturbance on the job which adversely affected efficiency and which reflected unfavorable on the agency.

Ernst acknowledged that, as stipulated[7] by the agency employee Connie Pyatt had been charged with two counts of misuse of government funds as a result of her application for a $500 travel advance on July 23, 1993, and a $450 travel advance on September 13, 1993, for which no travel was taken. He also acknowledged that, as stipulated by the agency, Pyatt received a five-day suspension for her misconduct. He said that Pyatt had not been employed as an Administrative Technician at the time of her misconduct.

The appellant asserted that the agency had engaged in disparate treatment in its selection of the penalty in her case. Moreover, she asserted that the agency had improperly considered the prior

disciplinary actions cited against her because the actions had not meet the criteria set out in Bolling v. Department of the Air Force, 9 M.S.P.R. 335 (1981). She further contended that the misconduct cited in those actions did not occur or that the agency had disciplined her in reprisal for her whistleblowing activities.

A review of the record reflects that in regard to the one-day suspension on March 29, 1993, for creating a disturbance and the seven-day suspension on May 9, 1994, for creating a disturbance, the appellant was (1) informed of the disciplinary actions in writing; (2) they are a matter of record; and (3) the appellant had the opportunity to dispute the charges to a higher level of authority than the one that proposed the discipline. Appeal File, Vol. II, tab 9, subtab 4G(5); 4G(1). Consideration of those prior disciplinary actions by Ernst was, therefore, appropriate in his determination of the appropriate penalty. See Bolling at 340. Moreover, the Board has held that the consideration of prior nondisciplinary counseling for the purpose of assessing the appropriate penalty is appropriate and may be relied upon by the agency in imposing an enhanced penalty. See Patterson v Department of the Air Force, 22 M.S.P.R. 6 (1984). Accordingly, I find that Ernst's consideration of the oral reprimand on August 4, 1992, and the oral admonishments on April 6 and 20, 1994, to be appropriate. I also find, however, that his consideration of the appellant's written reprimand on September 24, 1992, for

creating a disturbance, to be inappropriate because the record does not reflect that the Bolling factors were met in regard to that action.

Upon review of the record, I find that, even excluding the written reprimand of September 24, 1992, the record reflects that the appellant had been disciplined on two prior occasions for creating a disturbance and that she had received several oral counseling for the same or similar misconduct. Although there is nothing in the record to support a conclusion that the appellant's performance in her position was less than satisfactory, the fact remains that since 1992 the appellant has been found on numerous occasions to have engaged in the same or similar misconduct.

The evidence does not support a finding that any other agency employee with whom the appellant was similarly situated was disciplined less harshly than the appellant for charges based on the same or similar misconduct. There is no indication in the record of Pyatt's length of service with the agency, her job performance, or her prior disciplinary record. Moreover, the misconduct for which Pyatt was charged was different from that of the appellant. I find, therefore, that the record does not support a finding that Pyatt was similarly situation to the appellant. Moreover, I find that the record does not support the appellant's contention that the misconduct cited as the reason for her prior disciplinary actions did not occur or that the

disciplinary actions were taken in reprisal for her whistleblowing activities.

The appellant's misconduct was serious. The agency has the right to have employees it can trust. The appellant's misstatements and concealment of a material fact in connection with her employment severely diminished the agency's trust in her. Moreover, the agency has a right to expect its employees to conduct themselves in an appropriate manner without creating unnecessary disturbances and being unnecessarily uncooperative. Less severe actions have not impressed upon the appellant the importance of not creating disturbances and a hostile working environment. Having considered the serious nature of the appellant's misconduct and the agency's need to have employees whom it can trust and depend upon, I find that the agency's decision to remove the appellant is within the tolerable limits of reasonableness and for such cause as will promote the efficiency of the service.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

U. Sidney Cornelius, Jr.

U. Sidney Cornelius, Jr.
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. Section 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on May 4, 1995, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you have and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

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March 30, 1995
(Date)

Connie C. Brown
Legal Assistant